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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 73

FIRST SECURITY BANK OF UTAH,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent.

No. 1[redacted] 88

JAMES J. SAXON,
Comptroller of the Currency,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent.

On Petitions for A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES F. BELL
BRIAN C. ELMER
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

Of Counsel:
POGUE & NEAL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1009

FIRST SECURITY BANK OF UTAH,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent.

No. 1126

JAMES J. SAXON,
Comptroller of the Currency,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent.

On Petitions for A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (App. B. of Petition in No. 1126) is reported at 236 F. Supp. 457. The judgment of the court of appeals (App. A of Petition in No. 1126) affirming the decision of the district court is unreported. The opinion of the Tenth Circuit in *Walker Bank & Trust Co.* v. *Saxon* relied on by the court of appeals is reported at 352 F.2d 90 and is included herein at Appendix A.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitions.

QUESTION PRESENTED

Whether, pursuant to Section 36(c) of the National Bank Act, the Comptroller of the Currency may authorize a national bank to establish a de novo branch in a city when state law would prohibit a similarly situated state bank from establishing such a branch.

STATUTES INVOLVED

The pertinent provisions of the National Bank Act (12 U.S.C. § 36(c)) and the Utah Code Annotated (§ 7-3-6) are set forth in Appendix C of the Petition in No. 1126.

STATEMENT

Section 36(c) of the National Bank Act (12 U.S.C. § 36(c)) provides, in relevant part, that

> "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) within the limits of the city, town or village in which such establishment is situated, if such establishment, and operation are

at the time expressly authorized to State banks by the law of the State in question. . . ."

Section 7-3-6 of the Utah Code Annotated provides, in relevant part, that

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years."

The City of Ogden is, under Utah law, a city of the "second class" and is not located "in a county in which a city of the first class is located". First Security Bank of Utah, a national banking association, has its main office in the City of Ogden as do two state banks—the Bank of Utah and the Bank of Ben Lomand.[1] Accordingly, a state bank is prohibited under state law from establishing a de novo branch in the City of Ogden, Utah.

On June 25, 1963, First Security Bank of Utah (hereinafter called the "national bank") applied, to the Comptroller of the Currency (hereinafter called the "Comptroller") for permission to establish a de novo branch in the City of Ogden, Utah.

On July 18, 1963, respondent, Commercial Security Bank, brought suit against the Comptroller in the United States District Court for the District of Columbia seeking

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[1] In addition, both the national bank and respondent, Commercial Security Bank, each have a branch in Ogden established prior to the existing provisions of Utah branch law relevant to this case.

declaratory and injunctive relief. On July 19, 1963, the court issued a temporary restraining order prohibiting the Comptroller from approving the national bank's application to establish the proposed branch. Pursuant to a stipulation, hearing on the motion for preliminary injunction was postponed indefinitely.

On June 9, 1964, the Comptroller notified the national bank that its application was approved.[2] Subsequently the matter was heard before the district court on the Comptroller's motion to dismiss or for summary judgment and respondent's cross-motion for summary judgment.

On December 18, 1964, the district court (Youngdahl, J.) issued its decision enjoining the Comptroller from issuing a certificate approving the proposed branch. The court held that where a state bank would, by state law, be forbidden to establish a de novo branch bank, a national bank is similarly precluded by Section 36(c) of the National Bank Act from establishing such a branch. 236 F. Supp. 457 and Appendix B of Petition in No. 1126.

On November 18, 1965, the United States Court of Appeals for the District of Columbia Circuit entered its judgment affirming the decision of the district court. The court of appeals relied on a decision of the Tenth Circuit issued October 26, 1965, in *Walker Bank and Trust Co.* v. *Saxon*, 352 F.2d 90. This decision by the Tenth Circuit involved almost identical facts and the same Utah statutory provisions.[3] Neither the national bank nor the Comptroller sought a rehearing en banc of the decision below or of the decision of the Tenth Circuit.

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[2] The same day the national bank was allowed to intervene in the suit as a party defendant.

[3] A petition for certiorari in that case is presently pending before this Court. *First Nat'l Bank of Logan, Utah* v. *Walker Bank & Trust Co.*, No. 875 (Oct. Term 1965).

On February 11, 1966, First Security Bank filed a petition for a writ of certiorari in this case (No. 1009). On March 16, 1966, the Comptroller filed a similar petition (No. 1126).

ARGUMENT

I. The General Question Involved In This Case Has Been Extensively Litigated In Recent Years And The Decisions Of The Lower Federal Courts In Nine Circuits Are In Complete Accord.

The Comptroller states that the "general question, involved in this case . . . has been extensively litigated in recent years" and "the lower federal courts have reached sharply conflicting results" (Comptroller's Petition, p. 7). Section 36(c) of the National Bank Act has indeed been the subject of extensive litigation in recent years. However respondent completely disagrees with the petitioners' statement that the federal courts have reached "conflicting results".

The precise question presented to this Court has been argued to two United States courts of appeals.[4] Both the Tenth Circuit and the D.C. Circuit have *unanimously* rejected petitioners' arguments. In addition, the general question of whether the Comptroller of the Currency is or is not bound by state law in the establishment of branches has been considered in nine circuits. These decisions are unanimous in either establishing or following the proposition that Congress intended in Section 36(c) of the National Bank Act to establish competitive equality between state and national banks in the matter of branching by prescribing state law as the standard for the establishment of branches by national banks:

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[4] Judges Bazelon, Wright and Tamm of the D.C. Circuit; Judges Phillips, Pickett and Hill of the Tenth Circuit.

District of Columbia Circuit

First Security Bank of Utah, N.A. v. *Commercial Security Bank*, No. 19356, Nov. 18, 1965, affirming,

Commercial Security Bank v. *Saxon*, 236 F. Supp. 457, 461 (D.D.C. 1964);

> "If the Comptroller were permitted at this time to authorize branches for national banks when other banks in the city in question were not at the time and under the same conditions permitted by state law to branch, the Court feels that the purpose of Congress in enacting clause (1) of subsection (c) would not be met."

Union Savings Bank of Patchogue v. *Saxon*, 118 U.S. App.D.C. 296, 335 F.2d 718 (1964);

Gidney v. *Commercial State Bank of Roseville*, 108 U.S.App.D.C. 37, 278 F.2d 871 (1960) (per curiam), affirming,

Commercial State Bank of Roseville v. *Gidney*, 174 F. Supp. 770, 774 (D.D.C. 1959);

> "Branch banking (banking operations at other than the principal office) by national banks is regulated by state law because Congress has so provided. That is, Congress has adopted state law on the establishment of branches by state banks as the measuring stick for the establishment of branches by national banks. 12 U.S.C.A. 36(c)."

Third Circuit

Suburban Trust Co. v. *National Bank of Westfield*, 222 F. Supp. 269 (D.N.J. 1963).

Bank of Sussex County v. *Saxon*, No. C.A. 568-65, Feb. 16, 1966 (D.N.J.).

Fourth Circuit

First National Bank of Smithfield v. *Saxon*, 352 F.2d 267 (1965). (see discussion below)

Fifth Circuit

Jackson v. *First National Bank of Valdosta*, 349 F.2d 71, 74 (1965).

> "We start with the proposition that the source of First National's authority to open up the disputed drive-in window must be found in Section 36(c) of the National Bank Act. That statute is explicit in providing that the substantive law of the state in which each national banking association is located fixes the bounds of such association's branching authority. We agree with the district court in this case and in South Dakota, supra, at 846, that Congress did not have to give effect to state law. But it is highly significant that Congress did give it such effect and that it did so pursuant to a strong and distinct 'policy of equalization' for our dual banking system."[5]

Sixth Circuit

National Bank of Detroit v. *Wayne Oakland Bank*, 252 F.2d 537, 540 (6th Cir. 1958), *cert. denied*, 358 U.S. 830;

> "The history of federal legislation regarding branch banking and the statutes applying thereto leave a clear and definite impression that Congress intended, with respect to the location of branches, that a national bank should have no greater rights than it would if it were a state bank, and that a national bank was to be permitted to establish and operate a branch in a state only at such a point as it could, by express provisions of a state statute, establish and operate a branch if it were then a state bank."

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[5] The reference to *South Dakota* is to *South Dakota* v. *National Bank of South Dakota, infra*. The reference to the "policy of equalization" no doubt came from the opinion of this Court in *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559 (1934). (See p. 12 *infra*).

Bank of Dearborn v. *Saxon*, 244 F. Supp. 394, 401 (E.D.Mich. 1965);

> "It will be observed in the above statutory enactment that the law of the state involved is to be determinative as to the problem of branching. National Banks were given the same opportunity for branching as state banks, thus perpetuating the dual banking system."

Peoples Bank-Trenton v. *Saxon*, 244 F. Supp. 389 (E.D. Mich. 1965)

Seventh Circuit

Hoosier State Bank of Indiana v. *Saxon*, 248 F. Supp. 233 (N.D.Ind. 1965).

Eighth Circuit

South Dakota v. *National Bank of South Dakota*, 219 F. Supp. 842 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (1964), *cert. denied*, 379 U.S. 970 (1965);

> "Under 12 U.S.C.A. § 36(c), state law is adopted by the federal government and made the measuring stick by which it is determined whether national banks may establish branches." 219 F. Supp. 846.

Ninth Circuit

State Chartered Banks in Washington v. *Peoples National Bank of Washington*, No. 6338, Feb. 28, 1966 (W.D.Wash).

> "The conditions upon which a national banking association may establish and operate a branch, as set forth in section 36, in effect incorporate state laws. These state laws relate to the establishment and operation of branches as authorized to state banks. Therefore, in construing federal law, the court must also construe the pertinent banking laws of the State of Washington." Slip opin. p. 15.

Tenth Circuit

Walker Bank & Trust Co. v. *Saxon*, 352 F.2d 90, 94 (10th Cir. 1965).

> "With this, our review of the history of branch banking and section 36(c) ends. From it all, we are led to the inescapable conclusion that the purpose of allowing national banks to branch was to enable them to fairly compete with state banks. In enabling them to do this, Congress said in the McFadden Act that State law will in each instance determine whether to permit a national bank to branch. This policy was again carried over in the Banking Act of 1933. . . ." [6]

Petitioners' contention that the decision of the court below is in conflict with the decision of the Fourth Circuit in *First National Bank of Smithfield* v. *Saxon* [7] is erroneous. That case involved the procedural question of whether the Comptroller was required to hold a hearing before approving the establishment of a branch of a national bank. The court held that such a hearing was not necessary.[8]

In the course of its opinion the court also stated that national banks are not required to obtain a state bank supervisor's approval of whether there is a "need" for a

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[6] This is the decision upon which the court below relied in affirming the district court.

[7] 352 F.2d 267 (4th Cir. 1965), App. C to Petition in No. 1009.

[8] "The Comptroller of the Currency's approval of the establishment of a branch of a national bank is ex facie invalid, the District Court has held, if it is issued by the Comptroller without a hearing conforming to the requirements of the Administrative Procedure Act. In this view we think the Court was mistaken. Throughout it must be remembered that we are not deciding whether it would be advisable or more equitable for the Comptroller to grant a hearing. We are deciding . . . only that the law does not require it." (Footnotes omitted). 352 F.2d at 268, 269.

national bank branch. This statement is not only completely consistent with the holding of the court below, and of the *Walker Bank* case in the Tenth Circuit, but is one with which respondent completely agrees. Obviously, Section 36(c) only incorporates the provisions of state statutes setting forth specific restrictions, and not state regulations, rules, or practice requiring the exercise of administrative discretion by a state official.[9]

The results of the foregoing analysis demonstrate that

(1) Two courts of appeals, faced with identical facts and considering the same state statute, have unanimously decided against petitioners' contentions;

(2) Courts in nine circuits have considered the general question of branching by national banks and have unanimously held that the Comptroller is bound by the provisions of state statutes setting forth restrictions applicable to the establishment of branches by state banks; and

(3) Petitioners cite one federal decision as purportedly conflicting with these unanimous holdings. As noted above, the dicta relied upon in that case is in complete accord with the challenged decisions. There is no other holding to the contrary.

II. The Decision Of The Court Below Was Clearly Correct.

The statutes of the fifty states relating to branching by state banks vary widely. (Appendix B) They reflect the particular needs of each state relative to their differing economies as well as divergent philosophies of the degree of protection which should be afforded small unit banks throughout the state from branches of large city banks. Thus some sixteen states prohibit all branching. Eleven

[9] The Michigan Supreme Court case relied upon by petitioner, *Attorney General* v. *Michigan National Bank*, 298 Mich. 417, 299 N. W. 129 (1941), may be similarly distinguished.

other states permit unlimited state-wide branching. The remaining twenty-three states permit branches with widely varying restrictions in an effort to tailor branching requirements to the varying economic conditions within the state itself.[10] Utah is an example of the latter category. It permits de novo branches in the larger cities of the state, but prohibits such branches in the smaller cities if there is already any state or national bank providing a banking service there. The only way in which a bank may establish an additional banking office in a smaller city in which there is a unit bank already in operation is to merge with the unit bank and to continue to operate the office of the merged bank as a branch. In this respect the provisions of the Utah statute are similar to those of twelve other states. (Appendix C).

The existence of such a multiplicity of varying state branch laws creates a very practical problem. It is obvious that without competitive equality in such an important area as the right to branch between state banks, chartered by the states, and national banks, chartered by the Comptroller of the Currency under authority delegated by Congress in the National Bank Act, the "dual banking system" of national and state banks operating side by side could not long survive. In recognition of this fact, Congress established a policy of equalization between state and national banks in the matter of branching by prescribing state law as the standard for the establishment of branches by national banks under Section 36(c) of the National Bank Act. 44 Stat. 1228-1229 (1927), as amended, 12 U.S.C. § 36(c) (1965 Supp.). Both when

[10] Branches may be confined (a) to the city and/or county of the head office and/or contiguous countries; (b) to a specified mileage radius of the head office; or (c) to any of the foregoing dependent upon a minimum population or population range. In addition, some statutes provide that no branch may be established in a designated area where there is already a main office or branch of a state or national bank.

Congress permitted a national bank to establish a branch in the city in which the bank's home office is located in the McFadden Act of 1927 (now Section 36(c)(1) of the National Bank Act) and later when it permitted national banks to establish branches outside of the city in which the bank's home office is located in the Banking Act of 1933 (now Section 36(c)(2) of the National Bank Act), Congress established state law on branching as the standard for the branches of national banks. That Congress intended to establish such competitive equality between state and national banks in the matter of branching clearly emerges from a study of the legislative history of Section 36(c)(1), see *Walker Bank & Trust Co.* v. *Saxon*, 352 F.2d 90 (10th Cir. 1965),[11] and of Section 36(c)(2), see *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir. 1958), *cert. denied*, 358 U.S. 830. This fact is reflected in the decisions in nine circuits as set forth above. See also, the opinion of Mr. Justice Brandeis in *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559, 564, 565 (1934) citing both Sections 36(c)(1) and 36(c)(2) as examples of the "policy of equalization" established in the National Bank Act.

The construction given to Section 36(c)(1) of the National Bank Act by the incumbent Comptroller of the Currency, without any cited administrative or judicial precedent during the thirty-eight years this provision has been in the law, is absolutely irreconcilable with the policy of equalization established by Congress in the matter of branching by national and state banks. It destroys competitive equality in branching not only in Utah, but in the twelve other states with similar statutes. (Appendix C). State banks are prohibited from establishing de novo branches in any city of the "second class" in Utah where there is an existing banking facility. Their sole right to

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[11] See also, *Commercial Security Bank* v. *Saxon*, 236 F.Supp. 457 (D.D.C. 1964), *aff'd*, No. 19356, Nov. 18, 1965 (D.C. Cir.).

branch in such locations is to take over a unit bank which is then in operation and continue to operate the banking office of the merged banks as a branch. Nevertheless, the Comptroller has authorized a national bank to establish a de novo branch in Ogden which is prohibited to state banks. It is impossible to argue, and we do not understand the petitioners to argue, that an unlimited right to establish de novo branches is competitively "equal" with a right to continue to operate the offices of a merging bank as a branch. Therefore, the only way in which Congressional intent to insure competitive equality between national and state banks in the matter of branching can be maintained in this case is by a construction of Section 36(c) and of the Utah statutes which prohibits de novo branching by both national and state banks in the City of Ogden. That is the holding of the court below and of the *Walker Bank* case decided by the Tenth Circuit.

Petitioners argue that these decisions are allegedly wrong on two counts.

First, they argue that the only branching limitations in Section 36(c)(1) binding on the Comptroller are "geographical in character", and that the applicable provision in Utah law does not meet that characterization. This argument, insofar as respondent understands it, relates to the phrase "and subject to the restrictions as to location imposed by the law of the State banks" in subdivision (2) of Section 36(c) of the National Bank Act which petitioners read into subdivision (1) of Section 36(c), the applicable provision here. In its essence the argument is an unwarranted play on words. A provision, such as that contained in the Utah branch statute, prohibiting a de novo branch at a location where there are existing banking offices is just as much as a "restriction as to location", as is a branch statute prohibiting a branch more

than 10 miles from the head office. Both provisions specify a *location* at or in which *branching* is restricted.[12]

Secondly, petitioners attempt to assert error in the decision of the court below, and of the Tenth Circuit in *Walker Bank* by an injection of anti-trust considerations. In doing so they have missed the whole point of Section 36(c). Congress, *if* it wished to do so, could have barred the applicability of state law to the establishment of branches of national banks, and could have decided that national banks could establish branches anywhere in a state. Presumably, according to petitioner's anti-trust views, that is what Congress should have done. But Congress did *not* do so. It *deliberately* established state law as the standard for branches of National banks in order to maintain a policy of equalization in the matter of branching by state and national banks. Thus petitioners' argument falls as a completely unsupportable frontal attack on the policy of equalization, between state and national banks in the matter of branching, established by Congress in the McFadden Act of 1927 and reaffirmed in the Banking Act of 1933. Surely at some time during this thirty-eight year period, *if* Congress had disapproved of the policies of the states (now 41 in number) which either prohibit or restrict branch banking, it would have lifted the requirement binding the approval of branches of national banks to state law.

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[12] The Court of Appeals for the Sixth Circuit has upheld the branching law of Michigan, which like the Utah statute here involved, prohibits branches in locations where there is an existing banking facility. *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537 (1958). The national bank filed a petition for a writ of certiorari (October Term 1958, No. 216) contending at pp. 9-10 that Section 36(c) "encompasses only such restrictions as the state may impose as to geographic area or areas within which a State bank may establish branches", and that the Sixth Circuit was in error in "incorporating further limitations by construing it to include those provisions of State law which prescribe the number of State banks permitted to operate in a given locality." Certiorari was denied at 358 U.S. 830.

With such a clear-cut indication of Congressional intent, it is not necessary to consider petitioner's views as to whether branching restrictions are or are not anti-competitive in nature. However, respondent cannot fail to note the error in petitioner's analysis. Branching restrictions may, in fact, *promote* competition by prohibiting the expansion of large city banks all over the state to the detriment of small unit banks operating in smaller cities. Some states go so far as to prohibit all branching, thus encouraging the development of independent unit banks. Other states, with differing economies, see no danger in statewide branch banks. Many states, including Utah, take a half-way position. They state that if there are existing banking facilities in a town, there may be no increase in the number of those banking facilities *except* by the entry of a new unit bank.[13] They prohibit *de novo* branches and thereby encourage the development of new unit banks.

Petitioner's antitrust argument, therefore, reflects both a misunderstanding of competitive considerations in the matter of branching, and of the dominant theme underlying Section 36(c) of the National Bank Act: the establishment of a policy of equalization between state and national banks in the matter of branching by establishing state law as the standard for branches of national banks. The decision below was clearly correct.

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[13] A merger, with continued operation of the merged bank as a branch, does not, of course, increase the number of existing banking facilities.

CONCLUSION

For the foregoing reasons the petitions for a writ of certiorari should be denied.

Respectfully submitted,

JAMES F. BELL
BRIAN C. ELMER

Of Counsel:
POGUE & NEAL

April 15, 1966